IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
DESSEN, MOSES & SHEINOFF,	:	
Defendant.	:	**NO. 01-4625**

Reed, S.J. **March 5, 2002**

MEMORANDUM

Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), brings this action based on the alleged retaliatory discharge of Latasha N. Brown ("Brown") and Rashida A. Bizzell ("Bizzell") by the defendant Dessen, Moses & Sheinoff ("DM&S"). Presently before this Court is the motion of DM&S to dismiss this action pursuant to Federal Rule of Civil Procedure 12 (b)(6), (Document No. 5), and the response thereto. For the following reasons, the motion of defendant will be denied.

I. BACKGROUND

Plaintiff alleges the following. Brown and Bizzell visited the EEOC's Philadelphia District Office on May 9, 2001, intending to complain about alleged employment discrimination by DM&S. (Compl. ¶ 8 (c).) They returned approximately two hours late from lunch, at which time they were asked to produce an excuse note. (Id. ¶¶ 8 (d),(e).) The next day they obtained copies of their EEOC charge questionnaire forms, which they gave to the DM&S Office Manager, (Id. ¶ 8 (f)), who allegedly told them that she "could not believe [they] did this." (Id. ¶

8 (g).) Brown and Bizzell were terminated on that same day, effective May 9, 2001, and advised that the termination was the result of a "violation of . . . office rules." (Id. ¶ 8 (h).) The EEOC filed a complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Civil Rights Act of 1991, 42 U.S.C. § 1981a, contending that DM&S discriminated against Brown and Bizzell by terminating their employment as file clerks immediately upon learning of their attempt to file a complaint of unlawful employment discrimination and in retaliation for engaging in protected activity. (Compl. ¶ 1.)

II. STANDARD

When examining a motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(6), the Court accepts the allegations of the complaint as true and draws all reasonable factual conclusions in favor of the plaintiff. See Weston v. Pennsylvania, 251 F.3d 420, 425 (3rd Cir. 2001) (citing Lorenz v. CSX Corp., 1 F.3d 1406, 1411 (3rd Cir. 1993)). Under the federal rules, a claimant does not have to set out in detail the facts upon which a claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim. See Fed. R. Civ. P. 8; Weston, 251 F.3d at 428. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See id. at 429.

III. ANALYSIS

To establish a *prima facie* case of unlawful retaliation, a plaintiff must demonstrate that: (1) he or she engaged in activity protected by Title VII; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse employment action. See Weston, 251 F.3d

at 430.

Defendant first contends that because Brown and Bizzell never filed a formal complaint with the EEOC, plaintiff cannot show that they engaged in protected activity. For the reasons which follow, I disagree. Section 704(a) of Title VII makes it an "unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he [the employee] *has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter*." 42 U.S.C. § 2000e-3(a) (emphasis added). In addition to protecting the filing of formal charges of discrimination, § 704(a) protects informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges. See Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 288 (3d Cir. 2001) (citing Barber v. CSX Distribution Services, 68 F.3d 694, 702 (3d Cir. 1995) (citing Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990))). A formal letter of complaint to an employer or the EEOC is not "the only acceptable indicia of the requisite 'protected conduct.'" Id. Instead, this court is to look at the message being conveyed and not the medium of conveyance. See Barber, 68 F.3d at 702. See also Brachvogel v. Beverly Enterprises, Inc., 173 F. Supp. 2d 329, 330 (E.D. Pa. 2001) (notifying supervisor of alleged sexual harassment and intent to file a complaint with the Equal Employment Opportunity Commission which was never acted upon deemed actionable); Jones v. WDAS FM/AM Radio Staions, 74 F. Supp. 2d 455, 463-64 (E.D. Pa. 1999) (verbal complaints to supervisor held protected).

I find Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997), very instructive. The plaintiff in Hashimoto met with an EEO counselor because she believed she was being discriminated against, but decided not to file a complaint. See id. at 679. The court held that meeting with an the counselor "constituted participation 'in the machinery set up by Title VII,'" and as such, is protected under the Act. Id. at 680 (citing Eastland v. Tennessee Valley Auth., 704 F.2d 613, 627 (11th Cir. 1983) (contacting EEO officer is protected activity); Gonzalez v. Bolger, 486 F. Supp. 595, 601 (D.D.C. 1980), ("Once plaintiff . . . initiates pre-complaint contact with an EEO counselor . . . he is participating in a Title VII proceeding.") (citations omitted)), aff'd, 656 F.2d 899 (D.C. Cir. 1981)). Cf. Beeck v. Federal Express Corp., 81 F. Supp. 2d 48, 55 (D.D.C. 2000) (activities in preparation or furtherance of litigation have been considered protected) (citing Kempcke v. Monsanto Co., 132 F.3d 442, 445 (8th Cir. 1998))). I am persuaded by the logic of Hashimoto and consistent with the holding in Abramson, *supra*, I conclude that meeting with an EEO officer and complaining of discriminatory conduct is the same as making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges, all of which have been deemed protected activities under Section 704(a) by the Court of Appeals for the Third Circuit. See Abramson, 260 F.3d at 288.

In a very related argument, defendant contends that because Brown and Bizzell acknowledged in their respective "Decision Not to File" forms that neither had "standing to file a charge in that the matter in question is not jurisdictional under the laws administered by EEOC,"

plaintiff has failed to establish that the claimants were engaged in protected activity.[1] In order to be engaging in protected activity when complaining about discriminatory conduct, an employee does not need to prove that the conduct about which she is complaining is actually in violation of anti-discrimination laws; rather, she only has to have a good faith, reasonable belief that the complained of conduct was unlawful. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996) (citing Griffiths v. Cigna Corp., 988 F.2d 457, 468 (3d Cir. 1993)). See also Barber, 68 F.3d at 701-02 (holding that because letter complaint to human resources did not actually mention age discrimination, it could not constitute protected activity). In the charge questionnaires, Bizzell wrote "people don't like me because of the color of my skin and my age" and Brown wrote "I believe I am being discrimenate [sic] against due to my color & age." (Def.'s Ex. B.) Drawing all inferences in favor of the plaintiff, as required, I conclude that the complaint alleges that claimants went to the EEOC with a good faith belief that they were being discriminated against on the basis of their race and age. The fact that apparently neither plaintiff

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[1] DM&S attaches to its motion to dismiss the claimants' Charge Questionnaire and Decision Not To File forms, which are not part of the pleadings. (Def's Ex. B.) Under Rule 12(b), where "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgement." This process is known as conversion. See In re Rockefeller Ctr. Prop., Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999). The Court of Appeals for the Third Circuit has determined that a district court may consider "a document *integral to or explicitly relied upon* in the complaint. Id. (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996))) (emphasis in original).

Thus, this Court can examine any "undisputedly authentic document" attached as an exhibit to a motion to dismiss where plaintiff bases his claims on the document. See id. (quoting Pension Ben. Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). The rationale behind this exception is that the main concern in looking at documents beyond the pleadings is that the plaintiff lacks notice; this problem is dissipated where the plaintiff relies on such document in framing the complaint. See id. (citing In re Burlington, 114 F.3d at 1426). Upon conversion, this Court is directed to provide parties "reasonable opportunity" to present all material relevant to a summary judgement inquiry which requires "unambiguous" notice to the parties; it is recommended that the notice also be "express." See id. (citing Rose v. Bartle, 871 F.2d 331, 340 (3d Cir. 1989)). I conclude that the EEOC Charge Questionnaire and Decision Not To File forms are integral to the complaint; however, I further conclude that since, for the reasons which follow, this Court will be rejecting defendant's argument that the forms bar a retaliatory termination suit, express notice is not necessary here as plaintiff will not be prejudiced.

actually had a discrimination claim is not the focus of a retaliatory discharge claim. Accordingly, I conclude that plaintiff has alleged that Brown and Bizzell were engaged in protected activity when they met with the EEO officer.

Defendant's next argument is that the complaint fails to establish the requisite causal link because the decision to fire the claimants was made *before* DM&S knew that the claimants had gone to the EEOC. Defendant misreads the complaint. The complaint alleges that the claimants visited the EEOC office on May 9, 2001. (Compl. ¶ 8(c).) On May 10, 2001, Defendant's Office Manager requested that Brown and Bizzell produce an excuse note if they "wanted to keep their jobs." (Compl. ¶ 8(e).) The claimants provided copies of the EEOC Questionnaire and were *subsequently* terminated. (Compl. ¶¶ 8 (g),(h).) Thus, according to the complaint, the claimants were not terminated at the time that they were told to get an excuse note, but only *after* the defendant's Office Manager had reviewed the EEOC Charging Questionnaire. Accepting all the allegations in the complaint as true, and drawing all reasonable conclusions in favor of the plaintiff, the defendant's contentions can be given no weight, as they are not supported by the complaint.

IV. CONCLUSION

Defendant has failed to meet its burden under Federal Rule of Civil Procedure 12 (b)(6) to demonstrate that the complaint fails to state a claim.

An appropriate Order follows.

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ORDER

AND NOW this 5th day of March, upon consideration of motion of defendant Dessen, Moses & Sheinoff to dismiss the complaint for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12 (b)(6) (Document No. 5), and plaintiff's response thereto, and having concluded for the reasons stated in the foregoing memorandum that defendant has failed to meet its burden of demonstrating that the complaint fails to state a claim upon which relief may be granted, it is hereby **ORDERED** that the motion is **DENIED**.

IT IS FURTHER ORDERED that defendant Dessen, Moses & Sheinoff shall file an answer to the complaint no later than March 31, 2002.

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LOWELL A. REED, JR., S.J.